

PROSKAUER ROSE LLP

Lawrence I. Weinstein (LW-0792)

lweinstein@proskauer.com

Richard M. Goldstein (RG-8329)

rgoldstein@proskauer.com

Alexander Kaplan (AK-4207)

akaplan@proskauer.com

Alison M. Haddock (AH-4350)

ahaddock@proskauer.com

Eleven Times Square

New York, NY 10036

Tel. (212) 969-3000

Fax (212) 969-2900

Attorneys for Plaintiff

Church & Dwight Co., Inc.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
CHURCH & DWIGHT CO., INC.,

Plaintiff,

- against -

THE CLOROX COMPANY,

Defendant.
-----X

CIVIL ACTION NO.:

11CIV1865

**COMPLAINT AND
JURY DEMAND**

COMPLAINT FOR INJUNCTION, DAMAGES, AND OTHER RELIEF

Plaintiff CHURCH & DWIGHT CO., INC. ("Church & Dwight") complains against
Defendant THE CLOROX COMPANY ("Clorox") and alleges as follows:

INTRODUCTION

1. This is a civil action for false advertising and product disparagement under
Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), and for related violations of state law.

Church & Dwight seeks preliminary and permanent injunctive relief as well as the monetary remedies provided by federal and state law in order to put an end to a campaign of false and disparaging advertisements by Clorox unfairly seeking to promote its cat litter products at the expense of Church & Dwight's.

2. Church & Dwight and Clorox are two of the leading sellers of cat litter in the United States and compete against each other vigorously in the marketplace. Last fall, needing to improve its declining market share, Clorox began running a false and disparaging television campaign explicitly comparing the odor-eliminating efficacy of its Fresh Step® line of cat litter products made with carbon ("Fresh Step") and Church & Dwight's Arm & Hammer® Super Scoop® cat litter made with baking soda (the "Initial Commercials"). The Initial Commercials visually and verbally communicated that cats preferred to use Fresh Step cat litter over Arm & Hammer Super Scoop because, in the words of the Initial Commercials, "Fresh Step's scoopable litter with carbon is better at eliminating odors than Arm & Hammer's Super Scoop."

3. Clorox's expressly comparative advertising claims in the Initial Commercials were literally and materially false. Due to the likelihood of significant injury to the Arm & Hammer cat litter brand from those claims if the Initial Commercials did not promptly stop, Church & Dwight was forced to sue Clorox in this Court to put an immediate end to the Initial Commercials. In its initial Complaint (11 CV 0092 (DAB), filed January 5, 2011), Church & Dwight described the independent testing it had commissioned that demonstrated that cats do not prefer Fresh Step over Arm & Hammer Super Scoop.

4. Clorox evidently had no evidence to substantiate the false claims in the Initial Commercials because, as soon as Church & Dwight challenged those advertisements, Clorox agreed to discontinue them permanently. In reliance on Clorox's apparent cooperation, Church

& Dwight dismissed its initial complaint without prejudice on February 2, 2011.

5. However, less than two weeks later, Clorox was back on the air with a new commercial again falsely touting the alleged cat waste odor elimination superiority of Clorox's Fresh Step cat litters. This time, Clorox's commercial (the "New Commercial") upped the ante by making a superior odor elimination claim not simply against one variety of Church & Dwight's Arm & Hammer cat litter products, but against the entire line of Arm & Hammer cat litter products. (A storyboard of the New Commercial is attached at Tab 1 and a storyboard of a more recent variation of the New Commercial is attached at Tab 2.)

6. The odor elimination messages in Clorox's New Commercial are just as false as in the Initial Commercials. In fact, the New Commercial features the same recognizable elements of the Initial Commercials, as discussed further below.

7. The centerpiece of the New Commercial is an eye-catching demonstrative (referred to in advertising as a "Demo"), that compares the ostensible performance of two cat litters. One is specifically identified as Clorox's Fresh Step, which is claimed to use carbon as an odor-fighting ingredient. The other is a cat litter that is said to use baking soda as its odor-fighting ingredient. Although the New Commercial does not mention Arm & Hammer by name, Church & Dwight's Arm & Hammer cat litter is the only major brand of litter on the market to contain baking soda, a fact as to which cat owners are well aware. The New Commercial expressly states that "Fresh Step scoopable litter with carbon . . . is more effective at absorbing odors than baking soda." Moreover, as discussed in detail herein, the Demo visually portrays a huge difference between the odor absorbing properties of carbon-based Fresh Step and the baking soda-based litter meant to represent Arm & Hammer litters. Thus, the Demo in the 30-second version of the New Commercial shows the baking soda-based Arm & Hammer litter to

have only a minimal effect on cat waste odor, whereas the Clorox Fresh Step litter is depicted as almost entirely eliminating that odor.

8. The key verbal and visual messages of the New Commercial are literally false. A small typeface superscript (known as a “super”) that briefly appears in the Commercial while the Demo is showing states that Fresh Step’s odor elimination superiority over what is meant to be Arm & Hammer is proven by a “sensory lab test” after 1 day. The phrase “sensory lab test” refers to a laboratory study in which humans evaluate the cat waste odor emanating from the tested litter products. Church & Dwight, however, commissioned an independent laboratory to conduct a sensory study involving a panel of persons trained in odor evaluation that compared Clorox’s leading-selling Fresh Step litter product to one of the Arm & Hammer litters. The results of that study disprove Clorox’s claims in the New Commercial.

9. On every single day of the study, and overall across all days, the panelists’ average odor rating for Church & Dwight’s Arm & Hammer litter was lower than the average odor rating for Clorox’s Fresh Step, with a lower rating representing better cat waste odor elimination performance. On the first day of measurement – the day on which Clorox based its comparison of Fresh Step and “baking soda” (i.e., Arm & Hammer litters) – the Arm & Hammer product’s cat waste odor reduction superiority compared to Fresh Step was clinically statistically significant at the 95% confidence level, meaning that there is at least a 95% likelihood that the Arm & Hammer litter is not only better than Fresh Step in cat waste odor elimination, it is at least 0.5 rating units better on the 0 to 6 unit rating scale. The results were the same on the third measurement day.

10. The Arm & Hammer product was statistically significantly superior to Fresh Step at the 95% confidence level in terms of cat waste odor elimination overall and on all days but

one, and at no time was the Arm & Hammer product ever numerically or statistically inferior to Fresh Step, contrary to Clorox's express claim of Fresh Step's superiority in the New Commercial. Moreover, the study also demonstrated that, wholly apart from how the Arm & Hammer litter compared to Fresh Step, the performance of the Arm & Hammer product in terms of eliminating cat waste odor is extremely good, with the mean ratings of 1.3 on the first measurement day, and 1.4 across all days of the test, signifying that little cat waste odor could be detected in the litter boxes containing the Arm & Hammer litter. These results demonstrate the falsity of the Demo in the New Commercial, which purports to show that, both on an absolute basis and in comparison to Clorox's Fresh Step, Arm & Hammer litters with baking soda have only minimal efficacy against cat waste odor.

11. None of the members of the sensory panel that participated in the above study worked for Church & Dwight, and all of the panelists were blinded as to the identity of the test products and the purpose of the study. Accordingly, the study demonstrates that Clorox's unambiguous cat litter odor reduction superiority messages in the New Commercial are literally false.

12. The damage caused by Clorox's false advertising campaign to the goodwill of Church & Dwight's Arm & Hammer line of litter products – and more generally to all of its Arm & Hammer baking soda deodorizing products – is likely to be substantial and irreparable, and will continue to grow unless the New Commercial is preliminarily and permanently enjoined.

13. Through an enormous investment of time, money, and resources, Church & Dwight has developed highly effective cat litter products featuring its world-famous Arm & Hammer baking soda deodorizer. The Arm & Hammer line of cat litter products that is the subject of Clorox's false comparative advertising provide outstanding odor elimination

performance. Indeed, as discussed above, Church & Dwight's independent testing confirms that Arm & Hammer's baking soda-based cat litter is at least as good as, and most likely *better* at eliminating odors than Clorox's carbon-based Fresh Step.

14. Clorox's actions force Church & Dwight to seek this Court's assistance in preliminarily and permanently enjoining the dissemination of Clorox's New Commercial and to once and for all put an end to Clorox's false Fresh Step advertising campaign comparing its Fresh Step cat litter products to Arm & Hammer cat litters.

THE PARTIES

15. Plaintiff Church & Dwight is a Delaware company with its principal place of business in Princeton, New Jersey. Church & Dwight manufactures various consumer products, including cat litter. Church & Dwight's products, including its Arm & Hammer brand cat litter products, are sold throughout the United States and in the State of New York, including in this judicial district.

16. Defendant Clorox is a Delaware corporation located at 1221 Broadway, Oakland, California 94612. Clorox is engaged in the manufacture and sale of various consumer products, including the Fresh Step brand of cat litter. Clorox's products, including Fresh Step, are sold throughout the United States and in the State of New York, including this judicial district. The New Commercial has been aired and is airing nationally, including in this judicial district.

JURISDICTION AND VENUE

17. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the action arises under the Lanham Act, 15 U.S.C. § 1051, *et seq.*, and pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds \$75,000, exclusive of interest and

costs, and is between citizens of different States. The Court has supplemental jurisdiction over Church & Dwight's state law claims pursuant to 28 U.S.C. § 1367(a).

18. This Court has personal jurisdiction over Clorox because, on information and belief, Clorox sells products, offers products for sale (including via the New Commercial), and has disseminated the New Commercial in New York, including in this judicial district, and otherwise conducts business in New York, including in this judicial district.

19. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims alleged herein occurred within this district; and pursuant to 28 U.S.C. § 1391(c) because Clorox is subject to personal jurisdiction in this judicial district, and on that basis is deemed to reside in this district.

BACKGROUND

Arm & Hammer Baking Soda Products

20. Church & Dwight is one of the leading manufacturers of cat litter in the United States. Church & Dwight sells several varieties of cat litter under the Arm & Hammer® trademark that incorporate its well-known baking soda. Those varieties include, among others, Arm & Hammer Double Duty™ Clumping Litter ("Double Duty") and Arm & Hammer Super Scoop® Clumping Litter ("Super Scoop"). Church & Dwight has been marketing cat litter under the famous Arm & Hammer trademark for well over a decade, incorporating the renowned Arm & Hammer odor eliminating baking soda deodorizer into its cat litter products. Arm & Hammer cat litter products are used by more than 7 million consumers and its products provide outstanding odor elimination efficacy.

21. Church & Dwight also manufactures and sells many other deodorizing and cleaning products that incorporate baking soda, including laundry detergents, fabric softener

sheets, carpet deodorizers, air fresheners and toothpaste. Church & Dwight has built Arm & Hammer baking soda-based products into a billion dollar brand.

Cat Litter and Odor Elimination

22. The ability of a cat litter to minimize odors is a critically important product attribute. Cat waste has a strong odor that is very unpleasant to most people and consequently, cat litters are designed to eliminate malodor to the greatest extent possible. A cat litter that does not minimize cat waste malodor will be unsatisfactory to most consumers and will not be purchased to any degree of significance.

23. Cat litters, including the ones manufactured by Church & Dwight and Clorox, reduce odors in multiple ways. All Arm & Hammer litters and most Fresh Step litters are clumping litters. Clumping litters, which are the most commonly purchased type of litter, contain granules that form clumps when they come in contact with cat urine. The clumps absorb the urine and help to trap the malodorous moisture. The urine clumps can easily be removed to keep the litter box smelling fresh, without having to replace the entire litter. Litter granules also coat and dehydrate cat feces to form an odor barrier around the malodorous substance, which is then removed on a regular basis by the cat owner.

24. Many litters – including the most popular litters manufactured by Church & Dwight and Clorox – also contain fragrances that are added to the litter particles to mask cat waste malodors. These fragrances are typically an important feature of the odor relief provided by cat litters.

25. A third odor eliminating mechanism found in many cat litters is “malodor counteractants.” These are substances that either reduce the human perception of cat waste malodor, or react with the malodor molecules to eliminate or reduce their odiferous properties.

26. Finally, some cat litters also incorporate other odor-fighting ingredients. Church & Dwight adds baking soda to its litter products. Baking soda is a well-known deodorizer that works primarily by a process called neutralization and also, to a lesser extent, by a process called adsorption. Neutralization is a chemical process by which an acid and a base react with each other to form a non-volatile salt, thereby eliminating the odor molecule. Adsorption is a process by which a material binds odors (in this case, urine or feces odors) to its surface, thereby preventing the malodor from escaping into the air.

27. Most Arm & Hammer cat litter products, including Double Duty and Super Scoop, eliminate cat waste malodor through (a) clumping/coating the waste; (b) malodor counteractants; (c) neutralization and adsorption; and (d) fragrance masking.

28. Clorox manufactures cat litter products in direct competition with Church & Dwight. Its leading cat litter brand is Fresh Step. As the New Commercial emphasizes, Clorox's Fresh Step cat litter products include carbon as an odor-fighting ingredient. In most varieties of Fresh Step cat litters, carbon works together with four other components – clumping action, counteractants, antimicrobials (ingredients that reduce or prevent the odor-causing bacterial degradation of urine), and fragrances – to combat cat waste malodor. The Fresh Step line of cat litter products competes head-to-head with Arm & Hammer cat litter products, including Double Duty and Super Scoop.

29. Upon information and belief, the carbon in Clorox's cat litters works to reduce odors by adsorption but not neutralization.

30. Aside from cat litter products, Clorox also produces other household products, including cleaning products, which compete head to head with Arm & Hammer brand cleaning products containing baking soda.

CLOROX'S INITIAL COMMERCIALS

31. Upon information and belief, Clorox began disseminating the Initial Commercials early in the fall of 2010. For years, until the 13-week period ending in September 2010 (the measure by which the widely followed Nielsen Company measures share data), Fresh Step clumping litters outsold Church & Dwight's Arm & Hammer litters in the U.S. market. However, by the summer 2010, Arm & Hammer litters leapfrogged Fresh Step clumping litters in U.S. sales. Clorox's market share for Fresh Step was falling while the market share for Arm & Hammer brand cat litters was growing rapidly.

32. The Initial Commercials were comparative advertisements featuring visual images of cats choosing or rejecting litter boxes filled with Super Scoop or Fresh Step, with accompanying dialogue. There were three variations of the Initial Commercials.

33. The first of the Initial Commercials (a storyboard of which is attached at Tab 3) began with a series of home videos of cats jumping into or through different-sized boxes, accompanied by playful, upbeat music and an announcer's voice stating: "Cats like boxes. Big ones. Little ones. And ones with Fresh Step litter inside." Four different cats were shown entering a room that contained two litter boxes filled with cat litter. One litter box was prominently identified as Fresh Step, the other as Super Scoop.

34. Each of the cats was shown to choose the Fresh Step box over the Super Scoop box. Some of the cats, before choosing the Fresh Step box, were first shown sniffing or actually stepping into the box containing Super Scoop, but then stepping out and away from the Super Scoop box, rejecting it. Each of those cats then headed for Clorox's Fresh Step box. While this was occurring, the announcer explained that "cats like boxes ... with Fresh Step litter inside ... because Fresh Step's scoopable litter with carbon is better at eliminating odors than Arm &

Hammer Super Scoop.” A super in small text was displayed at the bottom of the screen stating, “Based on lab tests.”

35. The commercial’s spoken superiority claim of better odor elimination and the visual depictions described above clearly communicated that cats reject Super Scoop, that cats don’t reject Fresh Step, and that cats prefer Fresh Step over Super Scoop because Fresh Step is better at eliminating odors than Super Scoop. It is clear from the words and visual images of the commercial that the commercial is about cats’ preference for Fresh Step over Super Scoop, not human preference. This message is confirmed by the commercial’s final line, “Fresh Step: Cats know what they like.” No human being was shown or mentioned in the commercial.

36. Clorox began airing a shortened 15-second version of the first Initial Commercial at the end of December 2010 containing all of the verbal and visual messages described above, though abbreviating the introductory home videos of cats and showing only one of the cats presented with a choice between the Fresh Step or Super Scoop litters. That cat, before choosing the Fresh Step box, was first shown stepping into the box containing Super Scoop, but then stepping out and away from the Super Scoop box, rejecting it. (A storyboard of the 15-second version of the commercial is attached at Tab 4.)

37. Clorox then began airing another commercial in the beginning of January 2011 that essentially replaced the introductory videos of cats playing in boxes with other scenes of cats engaging in clever, playful behavior. As the videos played, the voiceover announced: “Cats are smart. They can outsmart their humans. Their canines. Unlock doors. They’re also smart enough to choose the litter with less odors.” The identical visual depictions in the earlier commercials of cats choosing the Fresh Step litter box over Super Scoop and rejecting the box containing Super Scoop were incorporated as the second half of the commercial. The announcer

then continued, "... That's because Fresh Step Scoopable litter with Carbon is better at eliminating litter box odors than Arm & Hammer Super Scoop. Fresh Step: Cats know what they like." (A storyboard of this commercial is attached at Tab 5.)

The Initial Commercials' Core Messages Were False and Misleading

38. Clorox's Initial Commercials expressly communicated the following false and misleading messages: that (i) many cats reject litter boxes filled with Super Scoop cat litter; (ii) more cats reject litter boxes filled with Super Scoop than litter boxes filled with Fresh Step; (iii) cats prefer Fresh Step to Super Scoop; and (iv) the reason cats prefer Fresh Step over Super Scoop is because Fresh Step is better than Super Scoop at eliminating odors (collectively, the "False Claims").

39. Church & Dwight commissioned a test to evaluate the performance of Super Scoop and Fresh Step, and specifically to determine the frequency with which house cats would reject either litter when used in the cat's everyday litter box ("Church & Dwight's Study"). Church & Dwight's Study was conducted in the homes of individual cat owners; cat elimination behavior was evaluated first using one of the litters in question, and then using the other litter.

40. Of the 158 cats involved in Church & Dwight's Study, only 6 – or less than 4% – rejected their litter box and relieved themselves elsewhere in the home when the litter box was filled with Church & Dwight's Super Scoop. Eight cats – slightly more than 5% – rejected their litter box when the box was filled with Clorox's Fresh Step litter.

41. Church & Dwight's Study demonstrated that only a miniscule percentage of cats reject Super Scoop and thus disproved the unambiguous visual communication of the Initial Commercials, which showed each cat visiting the box with litter labeled Super Scoop rejecting that box. Church & Dwight's Study also contradicted the comparative visual depiction in the

Initial Commercials, which showed each cat that visited the box with the litter labeled Super Scoop rejecting that litter, and no cats that visited the box with the litter labeled Fresh Step rejecting that litter. In short, Church & Dwight's Study demonstrated that only a minimal percentage of cats reject Arm & Hammer Super Scoop and that cats do not reject Super Scoop more than they reject Fresh Step. Thus, the results of Church & Dwight's Study demonstrated the falsity of the unambiguous visual communications in the Initial Commercials that cats frequently reject Super Scoop and that they reject Super Scoop more often than Fresh Step.

42. Church & Dwight's Study also proved that the "cat preference" claim in the Initial Commercial was false. Consumers typically use only one cat litter brand at a time. Thus, the most important measure of cat "preference" for one litter over another lies in a comparison of the extent to which cats reject one litter more than another litter. If cats do not reject Super Scoop more frequently than they reject Fresh Step – and Church & Dwight's Study demonstrates this to be the case -- then it is false to claim, as the Initial Commercials expressly did, that cats prefer Fresh Step to Super Scoop. Because Church & Dwight's Study showed that Super Scoop is not rejected by cats any more than Fresh Step is, and that Super Scoop is virtually universally accepted by cats, Clorox's preference claim is false and misleading.

43. Finally, the explicit statement in the Initial Commercials that the reason cats prefer Fresh Step over Super Scoop is because Fresh Step "is better at eliminating odors" than Super Scoop is literally false. The Initial Commercials were unambiguous that the judges of whether Fresh Step is superior at eliminating odors are cats, not people. But cats do not talk, and it is widely understood in the scientific community that cat perception of malodor is materially different than human perception. Thus, it is not possible scientifically to determine whether cats view one substance to be more or less malodorous than another substance. Accordingly, the

Initial Commercials' attribution of superior odor elimination as the reason for the supposed cat preference for Fresh Step compared to Super Scoop was literally false and misleading.

44. Apparently lacking any support for the claims in the Initial Commercials, Clorox agreed to permanently discontinue them as soon as Church & Dwight filed its Initial Complaint.

CLOROX'S NEW COMMERCIAL

The Commercial

45. Upon information and belief, Clorox began disseminating the New Commercial on or about February 14, 2011. The New Commercial appeared approximately three weeks after Clorox permanently removed its Initial Commercials from all television networks in response to Church & Dwight's complaint alleging that those advertisements were false and without substantiation.

46. The New Commercial picks up right where the Initial Commercials left off and is thematically comparable to the Initial Commercials. As discussed above, the last of the Initial Commercials opened with home videos showing cats engaging in clever behavior while a voiceover described how "cats are smart" and "smart enough to choose the litter with less odors," which the commercial claimed was Fresh Step.

47. Clorox's New Commercial follows the same home videos and "cats are smart" theme, featuring the same montage of playful home videos of cats (only reordered) followed by words and images combined to make an odor elimination superiority claim.

48. Using almost the identical wording while the identical cats-being-clever home videos are shown, the voiceover of the New Commercial commences: "We get cats. They're smart. They can outsmart their humans. And their canines." Once the home videos and the voiceover ends, the New Commercial then shows a cat entering a litter box and pawing through

the litter, as the voiceover continues, “That’s why they deserve the smartest choice in litter.” The video footage of the cat pawing through the litter appears to be the same as was used in the Initial Commercials.

49. The New Commercial then transitions to a demo that begins with a display of two laboratory beakers. One beaker is represented as Fresh Step and the bottom of it is filled with a black substance labeled “carbon.” The other beaker is located just beside the Fresh Step beaker and is filled with a white substance labeled “baking soda.” While the beaker containing baking soda is not identified as any specific brand of cat litter, Arm & Hammer is the only major cat litter brand that uses baking soda, and consumers recognize cat litter containing baking soda to be Arm & Hammer brand litter. Moreover, the continuation of the playful “cats are smart” theme and identical home video montage of cats doing clever things is, upon information and belief, designed to recall the Initial Commercials in consumers’ minds, which directly named an Arm & Hammer cat litter.

50. In the demo, the beakers are shown with a green gas obviously intended to represent cat waste malodor filling and floating through the remaining space in each of the beakers. Having stated that cats deserve the “smartest choice in litter,” the voiceover continues: “So we make Fresh Step scoopable litter with carbon, which is more effective at absorbing odors than baking soda.” As those words are uttered, the green gas in both beakers begins to dissipate. The gas in the Fresh Step beaker containing carbon is then shown to evaporate rapidly and almost entirely, signifying the near-total elimination of malodor. By contrast, the gas level in the beaker labeled baking soda barely changes, signifying that the litter with baking soda reduces cat waste malodor only minimally.

51. Underneath the demonstration, the following words appear in small text as a

super: “Dramatization of cat waste malodor after 1 day. Based on sensory lab test.”

52. Following the conclusion of the lab demonstration, the New Commercial concludes with the camera zooming in on a cat and stating: “Fresh Step. Your cat deserves the best.”

The New Commercial’s Messages Are False

53. The New Commercial communicates the literal message that Fresh Step cat litter products with carbon are superior (and in fact far superior) to Arm & Hammer cat litter products with baking soda at eliminating cat waste odor. Similarly, by continuing the “cats are smart” theme, showing the same video of a cat pawing through and appearing to indicate a preference for Fresh Step litter, and intending to evoke the messages communicated in the Initial Commercials, the New Commercial also communicates the false cat preference claim.

54. As described in detail below, Church & Dwight commissioned an independent testing company called ABIC Testing Laboratories, Inc. to run a sensory laboratory test (the type of test Clorox states in the New Commercial that it ran) comparing the cat waste odor elimination performance of Fresh Step with carbon to one of Arm & Hammer’s cat litters with baking soda (the “ABIC Study”).

55. The results of the ABIC Study demonstrate that the New Commercial contains literally false claims.

The ABIC Study Proves Clorox’s Claims To Be Literally False

56. Church & Dwight commissioned ABIC to conduct a human sensory study to evaluate the relative performance of Fresh Step scoopable litter with carbon and one of Church & Dwight’s Arm & Hammer cat litter brands, Double Duty, at reducing cat waste odor.

57. ABIC and Church & Dwight designed a sensory study in which a minimum of 30

panelists, each of whom was screened for odor discriminating ability and trained in the test methodology and procedures, were exposed to cat waste that had been systematically and consistently applied to litter boxes containing Fresh Step and Double Duty.

58. To account for variation between production lots, five different lots of each litter were used in a total of ten different boxes (five per litter product). Both actual cat urine and a synthetic cat feces mixture were applied to each litter box on a regular basis to mimic realistic, consumer relevant conditions. Synthetic cat feces, designed to mimic the smell of the real thing, should be used in human sensory tests for health reasons according to good laboratory practice.

59. Evaluations by the panelists were conducted on a “double blind” basis, meaning that the panelists did not know the identity of the litter products they were evaluating, and the technician applying the urine and synthetic feces did not know the identity of the products to which he applied the cat urine and feces. Other precautions were also taken so as to limit any influences or biases that could affect the panelists’ judgment, including assigning random three-digit codes to the litter boxes that changed daily, randomly rotating the order in which the panelists smelled the litter boxes each day, and covering the litter pans during evaluations to mask any visual product differences. (The covers have a smelling port to allow for odor evaluation.)

60. Each litter box (10 in all) was evaluated by each sensory panelist 7 times over a 10-day period for the intensity of the cat waste odor emanating from the litter box. Each panelist rated the odor intensity using a 7-point rating scale with odor levels rated from 0 to 6, with 0 representing no cat waste odor at all and 6 representing a very strong cat waste odor. At the conclusion of the test, a statistician evaluated the data according to a method of statistical analysis that had been established in the test protocol.

61. On every single day of the study, and overall across all days, the panelists' average odor rating for Church & Dwight's Arm & Hammer Double Duty was lower than the average odor rating for Clorox's Fresh Step, with a lower rating representing better cat waste odor elimination performance. On the first day of measurement – the day on which Clorox based its comparison of Fresh Step and “baking soda” (i.e., Arm & Hammer litters) in the New Commercial – the Arm & Hammer product's cat waste odor reduction superiority compared to Fresh Step was clinically statistically significant at the 95% confidence level, meaning that there is at least a 95% likelihood that the Arm & Hammer litter is not only better than Fresh Step in cat waste odor elimination, it is at least 0.5 rating units better on the 0 to 6 unit rating scale. The results were the same on the third measurement day.

62. The Arm & Hammer product was statistically significantly superior to Fresh Step at the 95% confidence level in terms of cat waste odor elimination overall and on all days but one, and at no time was the Arm & Hammer product ever numerically or statistically inferior to Fresh Step, contrary to Clorox's express claim of Fresh Step's superiority in the New Commercial. Moreover, the ABIC Study also demonstrated that, wholly apart from how the Arm & Hammer litter compared to Fresh Step, the performance of the Arm & Hammer product in terms of eliminating cat waste odor is extremely good, with the mean ratings of 1.3 on the first measurement day, and 1.4 across all days of the test, signifying that little cat waste odor could be detected in the litter boxes containing the Arm & Hammer litter. These results demonstrate the falsity of the Demo in the New Commercial, which purports to show that, both on an absolute basis and in comparison to Clorox's Fresh Step, Arm & Hammer litters with baking soda have only minimal efficacy against cat waste odor.

Harm Caused By Clorox's New Commercial

63. Clorox's portrayal of Church & Dwight's Arm & Hammer cat litter products intentionally misleads, confuses, and deceives consumers, through words and visual images, and through a combination of words and visual images, into believing (i) that Arm & Hammer cat litter products made with baking soda are barely capable of eliminating cat waste malodor; (ii) that Arm & Hammer cat litter products made with baking soda are less effective (in fact, far less effective) than Clorox's Fresh Step cat litter in eliminating cat waste malodor; and (iii) that Arm & Hammer products made with baking soda, and Arm & Hammer baking soda itself, do not eliminate odors well. All of these messages will cause irreparable harm to Church & Dwight if the New Commercial is not preliminarily and permanently enjoined.

64. As a leading brand of cat litter, Arm & Hammer has generated a substantial consumer following, and Church & Dwight has developed significant goodwill and reputation with regard to the Arm & Hammer cat litter brand specifically, and Arm & Hammer baking soda generally. Clorox's New Commercial and the Initial Commercials paint Arm & Hammer cat litters and Arm & Hammer baking soda in such an extraordinarily negative way that they likely will cause consumers to shun Arm & Hammer cat litter products and other Arm & Hammer products that incorporate baking soda as a deodorizer.

65. If the New Commercial is permitted to continue running until the conclusion of a trial of this case, the reputational and monetary damage to Church & Dwight, its cat litter products, and its broader line of deodorizer products that incorporate Arm & Hammer baking soda will be substantial. There can be no doubt that the New Commercial will rapidly and irreparably tarnish the goodwill and reputation that Church & Dwight has worked so hard to earn.

66. Indeed, the need for immediate judicial intervention is acute. Considering Clorox's airing of the Initial Commercials, compounded by its decision to run the equally false and derogatory New Commercial less than three weeks after agreeing to remove the Initial Commercials, and the even more recent appearance of a shorter variation of the New Commercial that conveys the same false claims, It is clear that Clorox will not stop its campaign of false advertising without being ordered to do so.

67. As a direct and proximate result of Clorox's false and misleading campaign, Church & Dwight is suffering immediate and continuing irreparable injury for which there is no adequate remedy at law.

68. Upon information and belief, the foregoing actions of Clorox were undertaken willfully and wantonly, and with a conscious disregard for Church & Dwight's rights.

69. The foregoing acts have occurred in, or in a manner that have affected, interstate commerce.

CAUSES OF ACTION

COUNT I

FALSE ADVERTISING IN VIOLATION OF THE LANHAM ACT, 15 U.S.C. § 1125(a)

70. Church & Dwight realleges and incorporates by reference paragraphs 1 through 69 of the Complaint, as though set forth in full herein.

71. The foregoing acts of Clorox constitute false advertising and false representation in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

72. Clorox is disseminating false statements of facts in its advertising regarding Church & Dwight's and Clorox's competing products.

73. The false and misleading advertising has actually deceived or have a tendency to deceive a substantial segment of the audience.

74. The false statements in Clorox's advertising are material, in that they are likely to, and upon information and belief have, influenced consumer purchasing decisions, and in particular, are likely to cause and, upon information and belief have caused, significant numbers of cat owners to purchase Fresh Step rather than Arm & Hammer cat litter products.

75. Clorox's advertising is likely to cause, and upon information and belief have caused, irreparable injury to Church & Dwight's cat litter business, and to the goodwill and reputation of Church & Dwight's cat litter and other baking soda products, and Church & Dwight has no adequate remedy at law. Upon information and belief, Clorox's actions will continue if not enjoined.

76. As a result of Clorox's false and misleading advertising, Church & Dwight has, upon information and belief, incurred damages in an amount to be proven at trial. Such damages include among other things, lost sales, harm to Church & Dwight's business reputation and goodwill, and harm to the value and goodwill associated with Church & Dwight's products in general, and its cat litter products, in particular.

77. Upon information and belief, Clorox has obtained significant sales of its Fresh Step litter and profits as a result of Clorox's false advertising, and Church & Dwight is entitled to disgorgement of those profits.

78. This is an exceptional case within the meaning of Section 35 of the Lanham Act, 15 U.S.C. § 1117.

COUNT II

VIOLATION OF NEW YORK GENERAL BUSINESS LAW

79. Church & Dwight realleges and incorporates by reference paragraphs 1 through 78 of the Complaint, as though set forth in full herein.

80. Clorox's advertising is materially misleading. Consumers and the public at large are being harmed as a result of Clorox's deceptive practices, acts, and advertisements.

81. The foregoing acts of Clorox constitute deceptive acts and practices and false advertising addressed to the market generally and/or in a manner that implicates consumer protection concerns in violation of New York State Gen. Bus. Law § 349.

COUNT III

**PRODUCT DISPARAGEMENT, INJURIOUS FALSEHOOD, AND
TRADE LIBEL UNDER NEW YORK COMMON LAW**

82. Church & Dwight realleges and incorporates by reference paragraphs 1 through 81 of the Complaint, as though set forth in full herein.

83. As described above, Clorox has disseminated false and disparaging statements of fact about Church & Dwight's cat litter products. These statements are not susceptible to any meaning other than one that is disparaging.

84. Clorox's false and disparaging statements were broadly disseminated to numerous third parties through television advertising.

85. On information and belief, Clorox's statements about Church & Dwight's products were made with either knowledge of the falsity of the statements or with reckless disregard of the truth or falsity of the statements.

86. On information and belief, Clorox made these false and disparaging statements

with intent to harm Church & Dwight, or with knowledge that harm to Church & Dwight would inevitably result.

87. Upon information and belief, these statements have played and will continue to play a material and substantial part in inducing consumers not to purchase Church & Dwight's products.

88. As a direct and proximate result of these actions, Church & Dwight has suffered and will continue to suffer significant and special damages.

89. The foregoing acts of Clorox constitute product disparagement, trade libel, and injurious falsehood under the common law of New York.

COUNT IV

UNFAIR COMPETITION UNDER NEW YORK COMMON LAW

90. Church & Dwight realleges and incorporates by reference paragraphs 1 through 89 of the Complaint, as though set forth in full herein.

91. The foregoing acts of Clorox constitute unfair competition under the common law of New York.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Church & Dwight prays for judgment against Defendant Clorox, as follows:

A. Preliminarily, in the case of the New Commercial, and permanently in the case of the New Commercial and the Initial Commercials:

(1) enjoining Clorox, its officers, agents, servants and employees, and all persons in active concert and participation with it, including Clorox's affiliates, from

further disseminating the false advertisements and the false claims therein in any form or medium;

(2) requiring Clorox to disseminate among consumers and retailers corrective advertising to dispel the false and deceptive messages contained in the false advertising; and

(3) requiring Clorox to recall from the trade and all distribution channels any and all advertising materials that include the false claims in the advertisements in any form or medium.

B. Directing Clorox to account for, and to pay over to Church & Dwight, all gains, profits, and advantages derived by Clorox from the above-described wrongful acts;

C. Awarding Church & Dwight all monetary damages sustained as a result of Clorox's unlawful conduct, in an amount to be proved at trial, and to be multiplied or otherwise enhanced because of Clorox's willful and deliberate activities described herein;

D. Directing Clorox to pay Church & Dwight punitive damages resulting from state law violations;

E. Directing Clorox to pay Church & Dwight the costs of this action and its reasonable attorneys' fees incurred herein as authorized by law; and

F. Granting Church & Dwight such other and further relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Church & Dwight hereby demands a trial by jury.

Dated: March 17, 2011

Respectfully submitted,

By: 

PROSKAUER ROSE LLP
Lawrence I. Weinstein (LW-0792)
Richard M. Goldstein (RG-8329)
Alexander Kaplan (AK-4207)
Alison M. Haddock (AH-4350)
Eleven Times Square
New York, NY 10036
(212) 969-3000

Attorneys for Plaintiff

Exhibit 1



PRODUCT Fresh Step Scoopable
MARKET National
PROGRAM Angel
CODE # 101002762
TITLE Cats Jump Into Boxes

LENGTH :30
STATION TNT
DATE 10-04-2010
TIME 07:47 AM



(MUSIC IN) MALE ANNCR: Cats like boxes.



(MUSIC)



Big ones.



(MUSIC)



Little ones.



And ones with Fresh Step



litter inside.



That's because Fresh Step's



scoopable litter with carbon



is better at eliminating odors than



Arm & Hammer Super Scoop.



Fresh Step. Cats know what they like.
(MUSIC OUT)

VIDEO ALSO AVAILABLE IN ANALOG & DIGITAL FORMATS

Material supplied by VMS may be used for internal review, analysis or research only. Any editing, reproduction, publication, re-broadcasting, public showing or display for profit is forbidden and may violate copyright law.

1500 Broadway, 6th Floor, New York, NY 10036 T 212 736 2010

Exhibit 2



PRODUCT Fresh Step Scoopable
MARKET National
PROGRAM The Rachel Zoe Project
CODE # 101217494
TITLE Cats Jump Into Boxes

LENGTH :15
STATION BRVO
DATE 12-27-2010
TIME 2:37 PM



(MUSIC IN)



MALE ANNCR: Cats like boxes.



Especially ones with Fresh Step litter inside.



Because Fresh Step's scoopable litter with carbon is better at eliminating odors



than Arm & Hammer Super Scoop.



Fresh Step, cats know what they like.
(MUSIC OUT)

VIDEO ALSO AVAILABLE IN ANALOG & DIGITAL FORMATS

Material supplied by VMS may be used for internal review, analysis or research only. Any editing, reproduction, publication, re-broadcasting, public showing or display for profit is forbidden and may violate copyright law.

1500 Broadway, 6th Floor, New York, NY 10036 T 212 736 2010

Exhibit 3



PRODUCT Fresh Step Scoopable
MARKET National
PROGRAM All My Children
CODE # 110100742
TITLE Cats Open Treat Container, Block Dog

LENGTH :30
STATION SOAP
DATE 01-03-2011
TIME 07:23 AM



(MUSIC IN) MALE ANNCR: Cats are smart.



They can outsmart their humans.



Their canines.



And locked doors.



They're also smart enough to choose the litter with less odors.



That's because Fresh Step Scoopable Litter With Carbon



is better at eliminating litter box odors



than Arm & Hammer Super Scoop.



Fresh Step, cats know what they like.
(MUSIC OUT)

VIDEO ALSO AVAILABLE IN ANALOG & DIGITAL FORMATS

Material supplied by VMS may be used for internal review, analysis or research only. Any editing, reproduction, publication, re-broadcasting, public showing or display for profit is forbidden and may violate copyright law.

1500 Broadway, 6th Floor, New York, NY 10036 T 212 736 2010

Exhibit 4



PRODUCT Fresh Step Scoopable
MARKET National
PROGRAM Top Chef
CODE # 110213678
TITLE Dog Pushes Cat In a Stroller

LENGTH :15
STATION BRVO
DATE 02-21-2011
TIME 12:11 PM



(MUSIC IN)



MALE ANNCR: We get cats.



They're into the royal treatment.



So they deserve the smartest choice in litter.



That's why Fresh Step Scoopable has carbon, which is more effective at absorbing odors than baking soda.



Fresh Step, your cat deserves the best.
(MUSIC OUT)

VIDEO ALSO AVAILABLE IN ANALOG & DIGITAL FORMATS

Material supplied by VMS may be used for internal review, analysis or research only. Any editing, reproduction, publication, re-broadcasting, public showing or display for profit is forbidden and may violate copyright law.

1500 Broadway, 6th Floor, New York, NY 10036 T 212 736 2010

Exhibit 5



PRODUCT Fresh Step Scoopable
MARKET Columbus, OH
PROGRAM Live With Regis and Kelly
CODE # 110207185
TITLE Cat Pounces On Dog, Unscrews Lid

LENGTH :30
STATION WBNS
DATE 02-14-2011
TIME 09:40 AM



(MUSIC IN) MALE ANNCR: We get cats. They're smart.



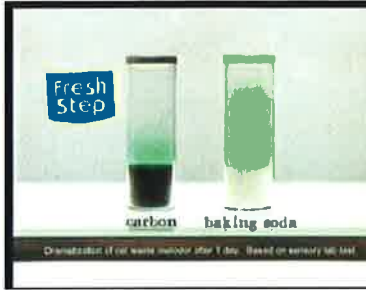
They can outsmart their humans.



And their canines.



That's why they deserve the smartest choice in litter.



So we make Fresh Step scoopable litter with carbon, which is more effective in absorbing odors than baking soda.



Fresh Step, your cat deserves the best.
(MUSIC OUT)

VIDEO ALSO AVAILABLE IN ANALOG & DIGITAL FORMATS

Material supplied by VMS may be used for internal review, analysis or research only. Any editing, reproduction, publication, re-broadcasting, public showing or display for profit is forbidden and may violate copyright law.

1500 Broadway, 6th Floor, New York, NY 10036 T 212 736 2010